

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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In Re: Levaquin Products)
Liability Litigation,) File No. 08-md-1943
) (JRT/AJB)
)
)
) Minneapolis, Minnesota
) April 27, 2011
) 2:32 P.M.
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BEFORE THE **HONORABLE JOHN R. TUNHEIM**
UNITED STATES DISTRICT COURT JUDGE
(STATUS CONFERENCE)

APPEARANCES

For the Plaintiffs:

RONALD S. GOLDSER, ESQ.
DAVID CIALKOWSKI, ESQ.
JAMES P. WATTS, ESQ.
LEWIS J. SAUL, ESQ. (Via phone)
CAIA JOHNSON, ESQ. (Via phone)
DAN McMICHAEL, ESQ. (Via phone)
DAVID WOODRUFF, ESQ. (Via phone)
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 JAMES IRWIN, ESQ.
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 Proceedings recorded by mechanical stenography;
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(In open court.)

THE COURT: You may be seated. Good afternoon, everyone. This is multi district litigation 08-1943, In Re: Levaquin Products Liability Litigation. We'll go through appearances here in the courtroom.

I think we already have down everyone who is on the phone, so we probably won't go through that, but let's go through the courtroom first.

Mr. Goldser?

MR. GOLDSER: Good afternoon, Your Honor. Ron Goldser from Zimmerman Reed, and with me from Zimmerman Reed are David Cialkowski on the end and Jim Watts, no relation to Mikal Watts, in the middle. We have a number of people on the phone today. It's a vast audience. I welcome them all.

I do want to call to your attention that Mr. Saul is on the phone.

THE COURT: Okay. Very well.

For the defense?

MR. DAMES: Good afternoon, Your Honor. John Dames.

MR. IRWIN: Good afternoon, Judge, Jim Irwin.

MS. VAN STEENBURGH: Hi, Judge. Tracy

1 Van Steenburgh.

2 THE COURT: Okay. Since we have such a large
3 number on the phone, we're just not going to go through
4 everybody. I think that has already been done, but
5 everyone's appearance will be noted on the record of this
6 hearing.

7 Okay. Let's begin. Mr. Goldser?

8 MR. GOLDSER: I presume the Court has a copy of
9 the agenda.

10 THE COURT: I do.

11 MR. GOLDSER: Most of this we will go through
12 quickly, but I think we will have a lot to talk about with
13 regard to the Christensen trial. In terms of the federal
14 and state coordination, the New Jersey trial, as I think we
15 have advised the Court, is now scheduled for late August,
16 early September.

17 The two cases will be tried together, Beare and
18 Gaffney.

19 THE COURT: Two cases?

20 MR. GOLDSER: Two cases, both over 60, male,
21 Achilles tendon rupture. Coincidentally, Judge Higbee is
22 holding a status conference right now today. So we have
23 both courts holding status conferences today.

24 THE COURT: Could you describe how the two -- I
25 have not spoken with Judge Higbee -- how the two cases were

1 chosen that they are going to try?

2 MR. GOLDSER: There were four New Jersey cases
3 selected for discovery and four New York resident cases. I
4 think it was ultimately narrowed down to one of the states.
5 Both Mr. Beare and Mr. Gaffney were from New Jersey, and
6 ultimately, they were chosen as being the most similar to
7 each other as possible.

8 There was a debate about whether an under 60
9 plaintiff should be included with that group, and
10 ultimately, it was decided there would be two over 60, and
11 then a second group in New Jersey was selected, both of
12 whom I believe are in their forties.

13 One of those cases, Gilmore, is mine. The other
14 case is Mastroianni. That belongs to I believe the Lanier
15 Firm. The Gaffney case is Mr. Saul's. Other than that,
16 that's all I have to say about the New Jersey litigation.

17 MR. DAMES: I don't have anything more to add to
18 that, Your Honor.

19 THE COURT: Thank you, Mr. Dames.

20 MR. GOLDSER: We have just a couple of items on
21 the Schedin matter listed. The post trial motions, we just
22 have the dates down, if nothing else as a reminder to
23 ourselves about what the due dates are and the hearing
24 dates scheduled. There is really nothing else to talk
25 about with that.

1 Ms. Van Steenburgh added the bill of costs issue
2 to this list. We are currently in the process of getting
3 the bill of costs through the clerk's office. The bill,
4 the taxation was filed, and the opposition was filed, and
5 response to the opposition was just filed yesterday or two
6 days ago.

7 Next step is for the Clerk to enter the Clerk's
8 judgment on costs, and if either party has an objection,
9 then we have to file that motion thereafter. I don't know
10 why it's necessary that there should be a hearing before
11 the Court. Maybe there will. Maybe there won't. Depends
12 on how the Clerk's judgment comes out.

13 Is there anything you want to add --

14 MS. VAN STEENBURGH: No. I want to ask in terms
15 of your general practice if you will hold a hearing, and
16 with the amount of detail that we have submitted here, the
17 Clerk may end up giving it to the Court to take a look at,
18 and so then we wanted to anticipate what we might need to
19 do in that regard.

20 THE COURT: I suspect that will be the case,
21 although I have not had any communication with the Clerk.
22 Typically with the amounts there, that would be I think a
23 standard practice. As to a hearing, I'm not sure yet. I
24 would want to look at it and look at the nature.

25 I took a quick look at it when we came in and the

1 response to that, but I want to take a closer look and
2 decide whether I think a hearing, oral argument on the
3 question would be helpful.

4 MS. VAN STEENBURGH: Okay.

5 MR. GOLDSER: We will wait to hear from the Court
6 then on the cost question, which then gets us to the
7 Christensen trial. As you can see, there are a number of
8 items that are on the list for today. Hopefully you can
9 give us some direction.

10 First off, there was a proposed scheduling order,
11 pretrial order number 11, that was submitted to the Court.
12 To our knowledge, that has not been entered yet. I don't
13 know if you had any questions or concerns about the
14 proposed schedule.

15 THE COURT: I think we were fine with it. I
16 don't know that we have entered anything yet, is that
17 correct?

18 THE CLERK: Correct.

19 THE COURT: I think we were going to pick a time
20 for a final pretrial conference and then enter it because I
21 don't have a problem with any of the other dates, other
22 than to probably rename it as pretrial order number 11 and
23 trial notice.

24 MR. GOLDSER: We have been working on the
25 schedule on the assumption that it will be acceptable. The

1 first date is this Friday when the parties will exchange
2 witness lists, and next Tuesday, we will be exchanging
3 exhibit lists. I'm sure we'll have some things to talk
4 about with regard to exhibits as we go through some of the
5 other agenda items.

6 THE COURT: I'm thinking probably the 26th or
7 27th of May for a final pretrial conference. Does that
8 make sense? Maybe the 26th? I think, I guess the 24th is
9 the last deadline here. I want to do it after we hit the
10 last deadline.

11 MR. GOLDSER: And the 27th is the Friday before
12 Memorial Day, if I notice it correctly, so the 26th might
13 be a little better.

14 THE COURT: 26th would be fine. What time would
15 you prefer?

16 MR. GOLDSER: One o'clock so that people can fly
17 in in the morning.

18 THE COURT: One o'clock is fine. So we will set
19 that May 26th at one o'clock p.m. here in the courtroom,
20 and we will have this filed this afternoon.

21 MR. GOLDSER: Okay. Thank you very much. The
22 rest of the items are in no particular order, so I will
23 just start from the top down, and we will see where it
24 takes us.

25 One of the issues that is outstanding is the

1 identification of the district sales managers and the
2 determination of which, if any, plaintiffs would like to
3 depose for the trial.

4 I believe that identification is imminently due,
5 and we have to decide which, if any, we want to depose and
6 how we go about doing that.

7 Are you going to address that, Tracy, please?

8 MS. VAN STEENBURGH: Thank you, Your Honor. This
9 is a new issue that hasn't come up before. We just were
10 given notice that they had an interest in getting the
11 identity of the district managers from 2001, I believe,
12 through 2006 and also that they have an interest in
13 deposing one or more.

14 Fact discovery and identification and interest in
15 this area has long been completed. We have already
16 provided sales reps over a year ago for them. There was no
17 mention of district managers at that time.

18 THE COURT: District manager would be the direct
19 supervisor of the sales representatives who go around?

20 MS. VAN STEENBURGH: Yes, and there may be more
21 than one district manager depending on the length of time
22 that the sales reps have been in their jobs, so we could
23 have multiple ones.

24 I am waiting to get some personnel files, which
25 we will get to here in a minute, and I think that will be

1 able to assist us in terms of how many and who they are,
2 but we really object to a deposition at this late time.

3 We have been given no information as to what the
4 purpose of the deposition would be, why a sudden interest
5 in the district manager, what information they're looking
6 for from the district manager.

7 And so we would object to doing this especially
8 at this late date, when we have so many other depositions
9 that have to be taken yet for trial. So that would be our
10 objection at this point, Your Honor.

11 THE COURT: Mr. Goldser?

12 MR. GOLDSER: I suspect, among other things,
13 Mr. Saul may have some comments on the history of this
14 because I don't think this is a new issue, as
15 Ms. Van Steenburgh describes, but be that as it may, like
16 other arguments that have been made recently by the
17 defense, the Christensen case was just selected.

18 To be sure we have not deposed all the district
19 managers. Let me tell you why district managers are
20 important. They go around with the field sales
21 representatives and monitor those field sales
22 representatives' sales calls. The district managers enter
23 reports on the efficacy of the sales managers' sales calls.

24 The district managers are privy more to policy
25 about what should be included in those sales calls and what

1 should not be included in those sales calls. So they're at
2 a different level of knowledge and an important level of
3 knowledge about what is being said to doctors in hand,
4 face-to-face, as well as a matter of policy.

5 So we think that the district managers are quite
6 important, and as indicated, Christensen having been
7 selected, it's just now that it becomes particularly
8 relevant to identify the district managers in that case, as
9 opposed to having done so before.

10 THE COURT: How large a district does the
11 district sales manager cover?

12 MS. VAN STEENBURGH: I'm not sure, Your Honor,
13 but I think it could be the entire state of Minnesota at
14 least, and there are regional district managers that cover
15 a greater area.

16 THE COURT: Okay.

17 MS. VAN STEENBURGH: The other two comments I
18 would make, you know, sales reps were deposed in 2009, and
19 they identified some of these people at that time. Nobody
20 mentioned they were interested in talking to these district
21 managers. This has been an issue that could have been
22 brought up a long time ago.

23 And then the other thing is, I don't know how
24 that's relevant to this particular case with Dr. Clark.
25 The district manager would have had no interaction with

1 Dr. Clark, and Dr. Clark has testified as to what he knew
2 or didn't know about the label. So it's not going to be
3 anything that is going to be relevant to this particular
4 case.

5 So we would object to further inquiry on this.

6 MR. GOLDSER: And --

7 THE COURT: Mr. Goldser?

8 MR. GOLDSER: And I don't know if Mr. Saul would
9 like to offer any thoughts on this subject.

10 Lewis?

11 MR. SAUL: Just briefly, Your Honor. One point
12 to bring to the Court's attention is that we tried to
13 coordinate with New Jersey all discovery, all experts, the
14 taking of depositions, the taking of fact witnesses, and we
15 have been allowed to, and we have agreed to with New Jersey
16 counsel, including Mr. Dames' firm, that we would take
17 district managers' depositions.

18 It's only as Mr. Goldser just indicated that this
19 case was only chosen recently so that the agreement only
20 went into effect maybe five or six months ago, so we --
21 this is, this is not an old matter. It's actually a rather
22 new matter, and as Your Honor knows, it's relevant to our
23 case about marketing and what was told to prescribing
24 physicians.

25 MR. GOLDSER: One other item: I know I was

1 paying particular attention to one of the sales
2 representatives, the one who was detailing Dr. Clark at the
3 time of the Christensen prescription. His name is Brian
4 Geerts, G-e-e-r-t-s, two E's.

5 And Mr. Geerts was not able to identify the
6 district manager in place as of May 2006, the time of the
7 prescription. So we didn't know, and we asked in 2009 when
8 his deposition was taken.

9 THE COURT: Well, let's do this: Let's see what
10 information about the identities of these people the
11 defense comes up with, and then at that point, it seems to
12 me if there is a person who clearly was the supervisor and
13 did go around with sales representatives at the time that
14 Mr. Christensen was treated, there may well be some
15 relevance, even if he didn't go around to Mr. Christensen
16 or to Dr. Clark or however that would work.

17 I guess it wouldn't be to Mr. Christensen. It
18 would be to Dr. Clark. What was said may possibly be
19 relevant, but I don't think that we have time for three or
20 four depositions here. At most, it may be one, but let's
21 see what the information shows us before we decide that.

22 MS. VAN STEENBURGH: Just a point of
23 clarification, Your Honor. You may not know the case
24 specific facts of this case. Mr. Christensen took Levaquin
25 at least six times over a course of five or six years, so

1 it would be 2001, I believe, to 2006.

2 So when you say at the time that it was
3 prescribed for Mr. Christensen, I'm assuming you're talking
4 about the time it was prescribed that he is claiming that
5 it was that time that it caused his Achilles tendon
6 rupture?

7 THE COURT: Yes.

8 MS. VAN STEENBURGH: Okay.

9 MR. GOLDSER: The other thing that bears on this
10 issue, Your Honor, is the item of the agenda, item 3G,
11 sales rep employment files. This issue has been on the
12 Court's agenda for a long time, and one of the things that
13 we have been going around with is who, how many, what do we
14 need.

15 Now that we have got a specific case, we have
16 identified which specific sales rep employment files that
17 we want, and we have made that request, and they're in the
18 process of being produced, and as I understand it, we will
19 have them at the end of this week.

20 One of the things that that file may very well
21 tell us is the report from the district manager and reports
22 about the sales rep's performance, and so to the extent
23 that there are such reports and the time of those reports,
24 that may very well tell us which district sales manager is
25 the most important or which ones are the most important,

1 depending on those reports.

2 As Ms. Van Steenburgh and I discussed earlier
3 today, you know, they have a couple of sales reps who have
4 been deposed, and they're in South Dakota. And so one of
5 the things we might have to do is go out and redepose them
6 in order to lay the proper foundation for these files, or
7 ultimately we may decide that we don't want to take the
8 trouble, and we will stipulate to the admissibility of
9 these files.

10 That is yet to be decided, and that may also have
11 some bearing on what we want to do with the district
12 managers. So these files will have some impact on the
13 district manager deposition question.

14 MS. VAN STEENBURGH: Well, as long as we have
15 gone down to the personnel files, it is true that we are
16 getting them for two of the representatives. However, I
17 think Mr. Goldser failed to say that we are going to look
18 at them, and if we believe there is information that is
19 subject to in camera review, we're going to ask the Court
20 to do that, rather than just turn them over willy-nilly to
21 the other side.

22 THE COURT: Okay. That's fine.

23 MR. GOLDSER: Back up to item 3C on the agenda,
24 sales aids, this kind of fits into the same category. We
25 have been talking about the sales aids for a long time,

1 including in the Schedin trial, and a number of the
2 witnesses have said that the sales aids exist, that copies
3 of them are maintained in a file cabinet in a warehouse
4 somewhere, and this comes from several depositions.

5 And we have been wanting to get our hands on the
6 actual sales aids that were actually used by sales
7 representatives, preferably by these sales reps to
8 Dr. Clark, but if not that, at least some generic copies of
9 actual sales aids.

10 To date, the witnesses that we have deposed have
11 all said, well, I don't think that's a sales aid. I'm not
12 sure whether it is. That looks like a draft to me, or if
13 it is a sales aid, I don't know.

14 I think where we left it, and Ms. Van Steenburgh
15 will correct me if I'm wrong, is that we have made a
16 request that they identify for us whether the sales aids
17 were produced, and the answer seems to be that, yes, they
18 were, and if so, what their Bates numbers are, because we
19 have looked, and we have not been able to find them.

20 So I think we have left it off that they will
21 provide for us some Bates numbers of the actual sales aids,
22 and that hopefully can get us farther down the road on this
23 issue, and then we will ask some foundational questions,
24 are they used with witnesses and the like. I guess we will
25 cross that bridge when we see what the documents are.

1 MS. VAN STEENBURGH: I guess to sum up, that's
2 substantially accurate.

3 THE COURT: You're getting better, Mr. Goldser.

4 MR. GOLDSER: Good.

5 MS. VAN STEENBURGH: All of the sales aids have
6 been produced. We have some reluctance for doing the work
7 that we think the plaintiffs need to do to locate those
8 sales aids, and I have had a discussion with Mr. Saul and
9 Mr. Goldser about the fact that some of them actually have
10 NDA numbers and were part of the NDA and all of that.

11 Be that as it may, we are trying to cooperate and
12 get as much of this pulled together as possible. It's not
13 true that all of the final sales aids were kept in a file
14 cabinet. I have done personal investigation to find out
15 where they are, and I'm nearing completion.

16 We're as interested in the final sales aids as
17 anybody else, so we are working on those. I can't say they
18 will be done at the end of today, but we should have that
19 pretty well closed, Your Honor.

20 THE COURT: Okay. Good.

21 MR. GOLDSER: I know that this issue has been
22 near and dear to Mr. Saul.

23 Lewis, I don't know if you have any further
24 comments you would like to make on the issue?

25 MR. SAUL: No further comments. Thank you.

1 MR. GOLDSER: All right. Item 3D, stipulation re
2 video depositions of plaintiff and spouse and Dr. Clark.
3 We have reached an agreement that we will be able to use
4 videotape depositions, to use an old-fashioned term, for
5 Mr. Christensen, Mrs. Christensen and Dr. Clark.

6 We also have to add to that stipulation one of
7 the family witnesses, whose name is Dawn Parker. I just
8 identified her yesterday and made mention of this to
9 Ms. Van Steenburgh today, so we have to modify the
10 stipulation to include her.

11 And there is a provision in the proposed
12 stipulation that the defense will reserve their right to
13 subpoena Dr. Clark because he is within the subpoena power
14 of the Court, although he is outside the 100-mile radius,
15 which makes his deposition usable. I think I got that one
16 right.

17 MS. VAN STEENBURGH: Yes.

18 THE COURT: So have the depositions been taken by
19 video already, or is this going to happen?

20 MR. GOLDSER: This is going to happen. Tentative
21 schedule is May 18 and 19 for all four of those
22 depositions, and they will all occur in Worthington.

23 THE COURT: Okay. Good.

24 MR. GOLDSER: Then item 3E, use of Schedin
25 rulings in the Christensen case. This is a fairly large

1 subject and fairly amorphous, but maybe you can give us
2 some guidance as a policy matter.

3 You know, we would like to try the facts of the
4 case but not have to retry every objection to every exhibit
5 and every ruling that came out of the Schedin case. We
6 have motions in limine that were filed in the Schedin case.
7 Query whether we need to remake them here?

8 We have *Daubert* motions. Similarly made in
9 Schedin. Do we need to remake them here? How do we
10 incorporate those kinds of rulings from Schedin into
11 Christensen without having to reinvent the wheel and
12 obviously make the second trial far more efficient than the
13 first trial, having done all of that hard work the first
14 time around?

15 I would like to suggest that we take as
16 incorporated by reference all of the Schedin rulings in the
17 Christensen case, unless a party has a specific objection
18 to either reiterate or a new objection to make for whatever
19 reason so that, you know, documents that were deemed
20 admitted in the Schedin case are deemed automatically
21 admitted in the Christensen case, subject to a new
22 objection or reiteration of an objection.

23 That way we know what the playing field is as far
24 as witnesses, as far as deposition designations, as far as
25 exhibits, I mean all of those things. That would make our

1 life a whole lot easier.

2 I can certainly tell you that the exhibit list
3 this time around is much shorter than the last time around,
4 and we are focusing only on admitted exhibits with a few
5 new ones, of course, and obviously the case specific ones
6 will be different, and even those are reduced down.

7 We do have some exhibits that we plan to use that
8 were offered as part of that bulk offer at the close of
9 trial which did not have any specific testimony about them.
10 My last count earlier today is that there are 38 of those
11 exhibits. Some of them are obviously admissible, like the
12 2004 package insert.

13 Some of them I think may duplicate some of the
14 other exhibits that were admitted, so I think that list
15 will shrink even further. I promised to provide a copy of
16 that list to Ms. Van Steenburgh so that she could see and
17 decide whether any of those exhibits are, in fact,
18 objectionable based on the fact that there has been
19 testimony behind them, and we will deal with that.

20 That's a small piece, but the bigger issue is,
21 how do we use the Schedin rulings in the Christensen case,
22 and I don't know if defense would like to comment on that
23 issue at this point.

24 MS. VAN STEENBURGH: Mr. Goldser talked with
25 several of us beforehand, but we didn't talk about the

1 specific subject, so I don't have a lot to say, other than
2 we are going to have different motions in limine, and we
3 are going to do a response to the motion to amend and add
4 punitive damages.

5 So some of these things can't just be wholesale
6 moved from Schedin into Christensen. The facts are
7 different. I guess I would like a little more time to
8 think about this, but I don't think it can be a wholesale
9 incorporation from one to the other, and we have, there may
10 have been some law that has developed.

11 I can think of one motion that we made. There
12 may have been a couple new cases that have come out since
13 then. We may have a different argument on a couple of
14 motions that have already been submitted in Schedin. I'm
15 having trouble.

16 Again, I don't want to reinvent the wheel, and I
17 don't want to, you know, kill more trees, but I do want to
18 make sure that we don't just wholesale incorporate one into
19 the other without thoughtful review of that.

20 THE COURT: I think that's probably a good way of
21 looking at it. This is probably a subject for a little bit
22 later in the process after you have had a chance to see. I
23 do expect that there will be some different issues raised.

24 There is just no question about that, but for the
25 most part, if an issue is identical or very substantially

1 similar to the Schedin case, I'm likely to rule the same
2 way anyway. So to the extent that you can stipulate on
3 that, that would be helpful.

4 MR. GOLDSER: And I think we're all saying the
5 same thing, that if it's the same, it will be treated the
6 same. If it's different and any one party thinks it's
7 different, they have the right to say it's different and
8 why, and the Court will take it up.

9 THE COURT: Right.

10 MR. GOLDSER: Ms. Van Steenburgh mentioned the
11 punitive damages motion, which is the next item on the
12 agenda. That has been filed. The defense response on the
13 proposed scheduling order is due May 13th. So that, that
14 is still out there to be addressed.

15 I don't know where in this schedule we have any
16 place to argue it, if argument is required. I guess we
17 will see whether argument is required after the briefing is
18 done, if either side wants to have argument.

19 THE COURT: I will do an argument on it if either
20 side wants to do it.

21 MR. GOLDSER: Okay.

22 MS. VAN STEENBURGH: Okay. We didn't put it in
23 there because we weren't sure it was necessary.

24 MR. GOLDSER: So item 3H, use of the Martyn Smith
25 trial testimony. Dr. Smith, you may recall, was our

1 toxicologist/pharmacologist. He is out of the country at
2 the time of this trial.

3 And so the question for us is whether his trial
4 testimony can be read into the record from the Schedin case
5 into this case. I talked with Ms. Van Steenburgh. She
6 told me right before the hearing today that they don't
7 agree to that, so we may ultimately need to ask the Court
8 for a ruling on the question of whether we can do that, if
9 plaintiff decides to go that direction.

10 We have an alternative direction to go, and that
11 is to have Dr. Zizic cover the pharmacology and toxicology.
12 He did so in his expert report, and we can do it that way,
13 but we would prefer to have Dr. Smith's testimony read into
14 the record, along with some of the exhibits that he
15 specifically laid the foundation for.

16 And I don't have my arms around what those are
17 precisely at the moment, but we may have some concerns
18 about some of those exhibits. That issue is lurking out
19 there. I'm not sure there is much else we can do with it
20 today.

21 Do you have any further comments?

22 MS. VAN STEENBURGH: He correctly stated that we
23 object to that proposal.

24 THE COURT: Okay. I guess we're back here.

25 MR. GOLDSER: All right.

1 THE COURT: Let's take this up as we get closer,
2 and, you know, it may be related in part to how much of the
3 testimony you think you wish to have introduced, what the
4 nature of it is. Let's get that identified, if that's what
5 you want to do, and then the defense can respond.

6 MR. GOLDSER: Okay.

7 MS. VAN STEENBURGH: The other thing, if I might
8 right now. One of the concerns we have, Your Honor, is
9 that we may want, we think we have the right to
10 cross-examine Dr. Smith. I mean, he is the expert, and so
11 it really is not a question of what and how much.

12 It really is whether he needs to be live, and we
13 need to perpetuate his testimony so that we have the right
14 to cross-examine him beforehand. So we will try to tackle
15 this sooner rather than later so if we need to bring it to
16 your attention, we will.

17 THE COURT: Okay.

18 MR. GOLDSER: And, frankly, I don't know why
19 testimony perpetuated in a conference room is different
20 from testimony perpetuated in a courtroom so that there
21 will be a resulting difference between the two, but if we
22 need to get there, we will get there.

23 MS. VAN STEENBURGH: It's a different case.
24 There may be other questions for cross-examination that
25 weren't asked before.

1 THE COURT: Okay. Okay. Next?

2 MR. GOLDSER: Item 3I, dismissal of defendants
3 other than Ortho-McNeil-Janssen Pharmaceuticals, Inc. The
4 defense has asked that we do that again in this case. I
5 had a conversation with Ms. Van Steenburgh about that
6 before we came out today. We had some dialogue on it that
7 I would like to have an opportunity to confer with
8 co-counsel on before we make a commitment about whether and
9 how we're going to do that, but that's up for discussion.

10 THE COURT: Okay. And in the Christensen case,
11 we have other plaintiffs listed, too, I believe, don't we?

12 MR. GOLDSER: I believe we do.

13 MS. VAN STEENBURGH: We do and I had asked
14 Mr. Goldser if we could amend the caption so that it only
15 applied to Christensen, and his proposal was that we just
16 leave it as is. It says applicable to the Christensen case
17 only.

18 If there is some procedural way that it would be
19 preferable for the Court, then we have to find a mechanism
20 because you are correct. There is Karkoska and I think one
21 other plaintiff was in this case as well.

22 MR. GOLDSER: We're open to suggestion. I'm not
23 sure what the answer to that one is.

24 THE COURT: Well, I think for purposes of the
25 trial, it's helpful to have the name of the actual

1 plaintiff so it doesn't get confusing to the jury. You can
2 tell them that when someone says why are these other names
3 here.

4 It seems to me that we can probably for trial
5 purposes amend the caption to just include
6 Mr. Christensen's name.

7 We have the issue of who to include from the
8 defense.

9 MR. GOLDSER: Right. We have to sort that one
10 out, the defense caption.

11 THE COURT: We will do so at the final pretrial.
12 Okay?

13 MR. GOLDSER: Item 3J, dismissal of claims other
14 than failure to warn and the Consumer Fraud Act. A
15 stipulation to that effect has been proposed on that. We
16 did that the last time. I want to be a little more careful
17 with the actual written stipulation.

18 Frankly, I haven't paid enough attention to it
19 yet to do that. Chances are if it's not exactly in the
20 form it should be, it is probably pretty close. That's
21 what we did with the jury instructions after all, and I
22 don't anticipate a large change in the jury instructions
23 for this case. So we will probably do that as well.

24 THE COURT: Okay.

25 MR. GOLDSER: Item 3K is the independent medical

1 examination that is scheduled for May 5th at a medical
2 clinic in Worthington. Dr. Paul Cederburg is going to do
3 that. Plaintiff will have a representative present. We
4 discussed that in the Schedin matter.

5 I don't know that we specifically discussed that
6 here, and I can't imagine there is an objection to that.
7 Here is the concern the plaintiffs have about the IME at
8 this stage. What was requested, and what the Court
9 granted, was the right to a noninvasive physical
10 examination.

11 Noninvasive is easy. We are not going to have
12 any shots or any biopsies or anything like that, but the
13 words "physical examination" may be a little bit
14 troublesome. The purpose of the exam, as I understand it,
15 is to determine Mr. Christensen's disabilities and what he
16 can do and what he can't do, what his physical limitations
17 are.

18 A lot of that can be done by pushing and pulling
19 and those kinds of physical tests.

20 THE COURT: And questions to him.

21 MR. GOLDSER: I'm sorry?

22 THE COURT: And questions.

23 MR. GOLDSER: And that's my concern, Your Honor,
24 because I have experienced in times past that an IME
25 becomes something of a deposition, taken by a doctor of the

1 plaintiff without counsel present to object and deal with
2 issues that might be out of bounds.

3 So I would like to get some scope limitation on
4 what kinds of communication can occur back and forth
5 between the doctor and Mr. Christensen. It seems to me
6 pretty clear that questions of history are not germane to
7 whether Mr. Christensen has physical limitations at the
8 present time.

9 And so Dr. Cederberg is not going to be talking
10 about causation, whether Levaquin caused the injury or any
11 of those kinds of things. What might be germane is how far
12 can you walk? Can you walk up and down steps? Does this
13 hurt?

14 And so I would like some help understanding what
15 the limitations are on the kind of communication that
16 Dr. Cederberg can have in this context when we don't have a
17 court reporter, and we don't have -- and the only record
18 that is going to be about who said what to whom is
19 Dr. Cederberg's memory and Cal Christensen's memory.

20 And then you end up with he said/she said, and I
21 really don't want to go there.

22 MS. VAN STEENBURGH: This is absolutely the first
23 time this has ever happened to me with an IME. I have
24 never had someone say you can't talk to the person. Now, I
25 hear Mr. Goldser lighten up there a little bit, but he had

1 contacted me and said it's a physical exam, no words
2 spoken.

3 I said, just as you said, he's going to ask some
4 questions. So I offered to talk to Mr. Goldser about the
5 parameters, and we haven't talked about that. Certainly
6 Dr. Cederberg is not there to talk about the litigation and
7 ask him about the litigation or his deposition and all
8 those kinds of things.

9 He's a doctor, and if he needs to find out
10 information about this man's medical condition or his
11 history or his physical limitations, it seems only right
12 that he should be able to do that. We are certainly going
13 to provide Dr. Cederberg with some records, so that will
14 expedite his review of things.

15 We don't want to make this into a marathon, and
16 if you're going to have a representative there, we would
17 like someone there as well at the IME, but we don't
18 anticipate and certainly we're not instructing
19 Dr. Cederberg to depose Mr. Christensen.

20 THE COURT: It seems to me that, you know, I
21 suppose there are boundaries that once you cross them go a
22 little bit too far in a medical examination. We probably
23 all recognize that. It seems to me the best thing to do
24 here is just to have him do a professional medical
25 examination.

1 And if there are issues with information that was
2 asked and answers given, we can deal with that after the
3 fact at a hearing.

4 MS. VAN STEENBURGH: Your Honor, we can offer to
5 have it audio taped if that would give comfort to
6 Mr. Goldser.

7 THE COURT: That would probably be helpful,
8 actually.

9 MR. GOLDSER: Okay. That would be a good plan.
10 Okay. There are a couple of other small items about the
11 Christensen trial that have come up that aren't on the
12 agenda.

13 One, Ms. Van Steenburgh and I are discussing
14 whether we can agree to a stipulation on medical bills,
15 foundation, correct copies, whether the bills are
16 necessary, related to necessary medical treatment and
17 whether the costs are reasonable.

18 That really, the only issue is whether or not the
19 treatment that was incurred is related to Levaquin which
20 goes to the rest of the issues in the case so that -- you
21 know the usual drill with medical bills. We're trying to
22 enter into that kind of stipulation, and so hopefully we
23 will have that done, but it's up for discussion.

24 And the other issue is trying to work out some
25 arrangement about exhibits which were introduced on

1 multiple occasions under multiple exhibit numbers that have
2 multiple MDL deposition numbers.

3 There are exhibit numbers that are all over the
4 place, and we really want to make sure that our record is
5 clear so that if somebody is referring to a specific
6 exhibit we know which one it is but that we don't have
7 multiple copies, and we're going to be working on that
8 issue as well.

9 THE COURT: Okay. Good.

10 MR. GOLDSER: I think that covers everything that
11 we had to talk about with regard to the Christensen trial,
12 unless you have some issues?

13 MR. DAMES: I don't think so.

14 MR. GOLDSER: Or unless the Court has a question?

15 THE COURT: Anybody on the phone, Mr. Saul,
16 anything that you have to raise concerning Christensen?

17 MR. SAUL: No, not at this time, Your Honor.

18 THE COURT: Okay. Thank you.

19 Anybody else? Okay. Go ahead, Mr. Goldser.

20 MR. GOLDSER: The only other items on the agenda
21 then relate to Phase II cases and the category of remand.
22 Phase II cases are listed by that denomination because we
23 were talking about a rough group of 35, 38 cases that had
24 been filed prior to a specific date, and we were looking at
25 those as the next set of cases to do discovery on and what

1 have you.

2 Mr. Saul and I were having a conversation about
3 this, and I proposed it to Ms. Van Steenburgh before today,
4 that maybe we ought to shift our focus a little bit about
5 the next round of cases, whatever you want to call them.
6 There seem to be two issues.

7 One is, how do you get a small group of cases
8 discovered for purposes of dealing with the 1404 venue
9 motion, and the second is, how do you deal, how do you get
10 a group of cases discovered for purposes of identifying the
11 next round of bellwether trials.

12 As to the bellwether trials, my understanding is
13 the next trial after the Christensen case will occur
14 roughly in November and that when we last spoke about it,
15 we were talking about three to five plaintiffs.

16 In the Phase II cases as previously denominated,
17 there were three Minnesota resident/Minnesota filed, and we
18 still have the Sharon Johnson case left over from the Phase
19 I. So there are four cases that are potential trials out
20 there for the next MDL bellwether case, but as the Court
21 knows, issues come up, and sometimes plaintiffs, their
22 cases get dismissed or passed over.

23 So we ought to have a larger group of cases for
24 that bellwether selection, and in addition, we were talking
25 about going through a large group of cases for purposes of

1 the 1404 motion. It seems to me we're a little backwards
2 on that, that we ought to have a larger group for second
3 bellwether cases being discovered, and we ought to have a
4 smaller group that address the 1404 venue issue.

5 To be sure, each 1404 venue question may be
6 different than to the rest, but if you have a small group
7 of them and use them as a litmus test to the 1404 issue, we
8 will get some flavor of what they look like, what the
9 motion looks like, what the Court will do with them.

10 You might decide they're not Minnesota resident,
11 they're going back, period, end of subject. You might
12 decide, everything is here. I know this case. I'm going
13 to keep them all here, also full stop, or you may decide to
14 send some back or not and not send others back. We don't
15 know yet.

16 I'm sure the Court doesn't know yet. So if we
17 take three cases for 1404 purposes out of the Phase II
18 group and work up the discovery necessary for those, we can
19 get that resolved in relatively short order, and the reason
20 I say three cases is because based on a -- the evaluations
21 that Ms. Van Steenburgh did, there happen to be three
22 cases, the names of which I'm always going to forget.

23 Griner is one of them. What are the other two?

24 MS. VAN STEENBURGH: I will explain when I --

25 MR. GOLDSER: There are three cases where we have

1 done some discovery already that are relevant to the 1404
2 issue where we don't have to do a heck of a lot more to tee
3 up the 1404 issues.

4 So I would propose that we take up those three
5 cases, work up the 1404 issue and have that decided and
6 that we then take the four other Minnesota
7 resident/Minnesota filed cases, that would be Johnson and
8 Straka and Olson and Mroz, M-r-o-z.

9 MS. VAN STEENBURGH: Martinka.

10 THE COURT: Not Anderson? You have got a Johnson
11 and Olson in there already.

12 MR. DAMES: That's right.

13 MR. GOLDSER: And that we take those four and add
14 to them another half dozen cases that are Minnesota
15 resident/Minnesota filed cases which are not going to be in
16 Phase II. They would be in Phase III and work those up as
17 the group from which we then ultimately select the next
18 bellwether case in November.

19 That's what we would propose to do.

20 THE COURT: So those four plus --

21 MR. GOLDSER: Those four plus six others.

22 THE COURT: Six. Okay.

23 MR. GOLDSER: They would go into a group, and if
24 the defense wants all four of those, then plaintiffs would
25 chose five. Defendants would choose five. If defendants

1 want those four as four of those five, then plaintiffs get
2 to choose five from Phase III.

3 If defense wants none of them, then they get to
4 choose five new ones. We will maybe chose from those four,
5 and maybe we won't choose any of those four. Maybe it will
6 be a whole different bunch, but each side gets to choose
7 five cases of the next group for discovery for bellwether.

8 So that's the proposition that I would like to
9 put before the Court.

10 MS. VAN STEENBURGH: Well, I have to be honest.
11 I didn't hear about this until we were waiting for the
12 Court to come in today. What we had agreed upon based on a
13 telephone conversation that Mr. Saul, Mr. Goldser and I had
14 was that they would decide whether they were going to
15 dismiss, and I have a chart for the Court that I will
16 provide to you, one, two, three, four, five, six, seven
17 cases where the plaintiff -- this is all Phase II -- where
18 the plaintiff has passed away.

19 So that's 7 of the 35 cases, and we have to, they
20 have to make a decision what they want to do there. Three
21 of the cases, Mroz, Olson and Straka, are Minnesota
22 resident/Minnesota filed, original Phase I cases.

23 So those would go along with Johnson and
24 Martinka, who is still in the mix, as five cases that are
25 potential bellwether cases to be tried. That leaves 13

1 cases of Minnesota filed but nonMinnesota resident cases in
2 Phase II, and three of those cases we had started some
3 discovery, but we have not completed that discovery, and
4 there are ten cases where no discovery has been started.

5 What I had thought I had an agreement with
6 opposing counsel was that we would split up the ten cases
7 where no discovery had been done, and we would get the
8 doctors' depositions scheduled. They would do half. We
9 would do half. We would have that ready to go as soon as
10 the Christensen case was tried and done.

11 And we would make the decision in terms of
12 whether we make a motion on those, because as the Court had
13 said in its earliest order, you wanted some discovery done
14 on those cases before a motion was brought. So we were
15 going to tee all of those up, get those ready to go so that
16 we could bring a motion by September.

17 We're still willing to do that. If the
18 plaintiffs want a greater pool of Minnesota residents in
19 Minnesota filed cases, we certainly can look at some of
20 those Phase III cases where that occurs, and I just looked
21 at my e-mail because I couldn't remember how many, and I
22 don't have -- someone hasn't e-mailed me back as to how
23 many are in that group, but I recall there were quite a
24 few.

25 So we can do both of those things. We can get

1 this portion of it done for purposes of the motion to
2 transfer, and if we want to make the pool larger, we
3 certainly have that, but I was going to offer to the Court
4 my color coding here.

5 Green are the deceased. Blue are the ones that
6 are 1404 but some discovery has been done. Lavender are
7 the three Phase III that are Minnesota filed/Minnesota
8 resident, and the white ones are the remaining where no
9 discovery has been done. So in case you just want a list,
10 you've got it there.

11 So our proposal would be to finish what we have
12 started here, and if there is some interest in broadening
13 the pool for additional bellwether cases, we will have five
14 bellwether cases from which to choose for the next group,
15 but if we want more than that, we could then look at what
16 is in Phase III for the Minnesota resident/Minnesota filed.

17 THE COURT: Well, I think it probably would be
18 helpful to have more than five ready for the next step in
19 the process so -- and it doesn't really matter to the Court
20 how those are decided, other than I would like to have both
21 sides involved in the decision making, and if you can agree
22 on people, that's great. Otherwise an even split is
23 probably the best way to do it.

24 MS. VAN STEENBURGH: Okay.

25 MR. GOLDSER: That doesn't necessarily answer the

1 question of, do we need to undertake discovery on 13 cases
2 for purposes of a 1404 motion, or is 3 enough to give us a
3 litmus test for how the Court is going to address that?

4 THE COURT: Ms. Van Steenburgh, let's hear from
5 you. What's your viewpoint on that?

6 MS. VAN STEENBURGH: Well, two things, and one
7 thing just occurred to me. As Mr. Goldser says, some of
8 the individual issues in each of the cases may be
9 determinative in terms of whether that gets transferred.
10 So it's a little hard to say they are bellwether 1404 cases
11 that we should use as a litmus test, so we would say that's
12 not the case.

13 It just occurred to me that if it turns out, and
14 I'm not sure how this works, if there are cases that the
15 Court doesn't transfer, I don't know. Do those go into the
16 pool of bellwether cases? They might, and then we try them
17 under a choice of law analysis, it seems to me. So we
18 might be able to accomplish that if that turns out to be
19 the way it shakes out.

20 THE COURT: Sure.

21 MS. VAN STEENBURGH: But we would prefer to get
22 all of the ones in Phase II tried. You wanted the
23 discovery done anyway even if you can transfer them back,
24 so we may as well get that done.

25 MR. GOLDSER: And my concern is with using the

1 resources of the parties as wisely as we can. We will go
2 to trial. We have to do a bunch of discovery in cases. Do
3 we want to put more of our effort into working up cases for
4 trial or do we want to put more of our effort into working
5 up cases for a 1404 motion?

6 It seems to me we are better served by putting
7 more of our effort into working up cases for trial and
8 eliminating the 1404 pool.

9 THE COURT: Yeah. Go ahead, Mr. Dames.

10 MR. DAMES: Sorry, Your Honor. There are a
11 couple of obligations, I guess, we have in this proceeding
12 in an MDL. It isn't just to prepare some cases for trial
13 before the MDL court but to determine what the scope of the
14 litigation is and where those cases properly belong and how
15 some cases should be remanded.

16 One of the things about doing the discovery the
17 way we propose, the cases we thought we had an agreement on
18 that would additionally find where we stood on the 1404
19 cases doing that discovery is, it gives us a handle on the
20 broader scope, I think, of what is the responsibility of
21 all of us in an MDL.

22 So I don't think it's just to prepare the cases
23 for trial before the MDL court, but it's a broader scope,
24 and I thought that had accomplished a balancing of the
25 factors that I think we should pursue.

1 THE COURT: Well, I don't necessarily disagree
2 with the concept of a number of bellwether cases for
3 transfer motions. That's not a bad concept. I'm not sure
4 that 13 isn't too large a number, though. Maybe there can
5 be some winnowing of that number down.

6 Three sounds like it might not be enough at this
7 stage, but 13 sounds like too many, if that makes any
8 sense. If we can winnow it down for discovery purposes
9 anyway, it will require a closer look at all of them to
10 decide which ones would be most appropriate for discovery.

11 Let's proceed in that way. Okay?

12 MR. GOLDSER: We will have further conversation,
13 then, to see what we can do.

14 THE COURT: Okay.

15 MR. GOLDSER: The last item that is on the agenda
16 deals with remand and the remand plan, and I'm not sure if
17 there is anything ripe there, other than I decided to keep
18 it on the agenda and keep the word "mediation" there every
19 time the word "remand" is there.

20 If the defense wants remand, they need to know
21 that I'm going to insist on mediation before we begin the
22 course. That's all I'm going to say about that.

23 THE COURT: That's fair.

24 Mr. Dames, anything else?

25 MR. DAMES: No, Your Honor.

1 THE COURT: Anyone on the phone have anything
2 they would like to raise today?

3 MR. SAUL: Lewis Saul. Not I, Your Honor.

4 THE COURT: Okay. Thank you all who have
5 listened patiently. The reception worked well from our
6 standpoint here, so we appreciate your cooperation on that.

7 MR. GOLDSER: Another status conference date?

8 THE COURT: Yes. Let's pick one. We will have
9 the final pretrial in a month. Do we want one in between,
10 or is that enough? We have a status conference at the same
11 time.

12 MR. GOLDSER: Can we request one if there are
13 issues --

14 THE COURT: Absolutely.

15 MR. GOLDSER: -- that come up and just do it that
16 way?

17 THE COURT: Absolutely. The week before the week
18 of the 16th generally is a pretty good week for fitting
19 something in, either in person or by phone.

20 MR. GOLDSER: Let's leave it open, and if either
21 party feels the need, we can call you and get something
22 scheduled.

23 THE COURT: Okay. Sounds good.

24 Anything else for today?

25 MR. GOLDSER: Not from the plaintiffs.

1 THE COURT: Thank you, everyone. We will be in
2 recess, and we will see everyone soon.

3 MR. DAMES: Thank you.

4 THE CLERK: All rise.

5 (Court was adjourned.)

6 * * *

7 I, Kristine Mousseau, certify that the foregoing
8 is a correct transcript from the record of proceedings in
9 the above-entitled matter.

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13 Certified by: s/ Kristine Mousseau, CRR-RPR
14 Kristine Mousseau, CRR-RPR

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